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SUPREME COURT, U.S.
FILED
MAY 24 2004
OFFICE OF THE CLERK

No. 03-1405

IN THE

Supreme Court of the United States

HOTEL & MOTEL ASSOCIATION OF OAKLAND, *et al.*,
Petitioners,

v.

CITY OF OAKLAND, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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May 24, 2004

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REPLY BRIEF OF PETITIONERS

In our petition, we demonstrated that review by this Court is necessary to resolve an issue of recurring national importance concerning the appropriate standards that apply to assess facial challenges to the constitutionality of a statute. Pet. 11-25. We showed that there is a conflict among this Court's decisions regarding the proper standard for evaluating such a challenge, and that this conflict is reflected most clearly in this Court's decisions in *United States* v. *Salerno*, 481 U.S. 739 (1987), and *City of Chicago* v. *Morales*, 527 U.S. 41 (1999). Pet. 12-17. Moreover, we demonstrated that the conflict between these standards presents an issue of surpassing national importance, that has generated debate among Justices of this Court, as well as confusion among the courts of appeals, which have struggled to reconcile this Court's competing approaches, *id.* at 12-21.

Finally, we showed that this case is a proper vehicle for resolving this conflict because the court below (i) recognized the conflict between *Salerno* and *Morales*, Pet. App. 17a-18a, (ii) made clear that it would remain bound by this Court's decision in *Salerno* ("[u]ntil a majority of the Supreme Court directs otherwise"), *id.* at 19a, and (iii) applied the *Salerno* test to reject petitioners' challenge to two ordinances enacted by the Council of the City of Oakland that impose criminal liability when hotel operators are deemed to be "contributing to nuisance activities on or in 'close proximity to' the property," *id.* Further, petitioners showed that the court of appeals' adoption of the *Salerno* test was outcome determinative because the court below could not have reached the same judgment if it had applied this Court's decision in *Morales*. Pet. 22-25.

Respondents' Opposition ("Opp.") narrows the area of dispute to a single issue. They do not (and can not) deny that there is a tension between this Court's decisions in *Salerno*

and *Morales*, or that the proper standard for addressing facial challenges presents an issue of surpassing importance that *should* be resolved by this Court. Nor do they dispute that this conflict has generated significant confusion among the federal courts of appeals struggling to reconcile this Court's inconsistent pronouncements. Opp. 2. Instead, they argue that further review is not warranted *in this case* because the decision below "does not fairly present" this issue, *id.* at 1, in that court of appeals "applied both standards," *id.* at 2.

In making that argument, respondents cannot dispute that the court of appeals devoted significant effort to explaining why it felt bound by this Court's decision in *Salerno* rather than *Morales*. Pet. App. 17a-19a. That predicate determination was essential because, as respondents acknowledge, the court of appeals never addressed, under *Morales*, petitioners' core claim whether the challenged Ordinances were invalid because they subject to criminal penalties otherwise innocent conduct that law-enforcement officials deem to have "contribute[d]" to "nuisance" activity on or "in close proximity" to hotel property. *Id.* at 7-10. Respondents argue that the court of appeals' failure to address this claim under *Morales* should be excused because petitioners' never advanced this claim on appeal.

Respondents' argument is demonstrably wrong. Petitioners expressly argued to the court of appeals that the Ordinances were unconstitutionally vague under *Morales* because they lacked a mens rea requirement and carried criminal penalties for "contributing" to "nuisance" activities that occurred on or in close proximity to their property. Opp. 7-10. Petitioners explained that this combination of factors rendered the challenged ordinances unconstitutionally vague under *Morales* by creating "a 'trap for those who act in good faith,'" Appellants' Opening Br. 29, and allowing "law enforcement to arbitrarily enforce the ordinance," Appellants' Reply Br. 9. The suggestion that this issue was not presented to the court of appeals is thus directly refuted by the appellate record.

The court of appeals' strict reliance upon *Salerno* to reject petitioners' claims implicates an issue that has generated a conflict among this Court's decisions on an issue of national importance. The petition for certiorari should be granted.

I. A SINGLE STANDARD SHOULD GOVERN FACIAL CONSTITUTIONAL CHALLENGES TO GOVERNMENT ENACTMENTS.

There is no dispute that there are two competing standards in this Court's decisions for assessing facial constitutional challenges to government statutes, and that these conflicting standards have generated confusion among the courts of appeals. Pet. 12-21. Respondents do not quarrel with the claim that this Court's decisions in *Salerno* and *Morales* reflect irreconcilable tests for assessing facial challenges to the constitutionality of a statute. Further, respondents acknowledge that this conflict has led to "discussion" in the courts and the academy, including an extensive discussion by the court below in this case. Opp. 2.

The resulting confusion among lower courts concerning the appropriate standard to apply to facial constitutional challenges is an important and recurring question of federal law. Given the importance of this issue, the only argument that respondents provide for opposing further review by this Court is their claim that the question whether *Salerno* or *Morales* provides the appropriate standard is not "properly presented in the record." Opp. 4. As shown below, that argument is incorrect and should be rejected.

II. THE CONFLICT BETWEEN THIS COURT'S COMPETING STANDARDS IN *SALERNO* AND *MORALES* IS SQUARELY PRESENTED.

Respondents predicate their opposition to certiorari by this Court almost exclusively on their claim that the court of appeals rejected petitioners' vagueness claim under both *Salerno* and *Morales*. Opp. 1-4. In doing so, respondents rely on the court of appeals' statement that "'even if the all-

or-nothing principle were inapplicable, the Association's challenge cannot succeed.'" Opp. 3 (emphasis and alteration omitted) (quoting Pet. App. 19a.). Respondents, however, acknowledge that the court of appeals' statement was directed solely to petitioners' challenge to the "close proximity" language of Ordinance No. 12136. *Id.* at 7-10. They argue that the court of appeals' failure to address the vagueness claims highlighted by petitioners before this Court should be ignored because they contend that "the 'close proximity' language was the only provision that petitioners specifically challenged and actually presented to the Court of Appeals for its review." *Id.* at 7. That claim is contrary to the record.

A. Petitioners' Claim Under *Morales* Was Properly Presented To The Court Of Appeals.

Petitioners' challenge to the impermissible vagueness of Ordinance Nos. 12136 and 12137 was *not* limited to the phrase "close proximity." That conclusion is confirmed by a review of petitioners' briefs before the court of appeals.

In those briefs, petitioners clearly argued that the absence of a *mens rea* requirement made "a facial challenge particularly appropriate." Appellants' Opening Br. 28. Specifically, petitioners challenged the "performance standards under Ordinance No. 12136," which required that "the operation of the property shall not result or contribute to nuisance activities in 'close proximity' to the property." *Id.* at 29. Petitioners explained that the ordinances set "a 'trap for those who act in good faith'" because, "[w]ithout a mens rea standard," one could be held strictly "liable for contributing to such [nuisance] activity in close proximity to the property," *Id.* Indeed, petitioners underscored the vagueness of the standards to which property owners were required to adhere to avoid criminal sanctions: "What is the standard for the terms 'contribute' or 'close proximity to the property'?" *Id.*

Petitioners further took issue with the district court's rejection of their vagueness claim because it was "focused on

the type of nuisance activity,"—*i.e.*, the conduct that could qualify as a nuisance—but was "devoid of any meaningful analysis in relation to *these terms* or the lack of a *mens rea* requirement." *Id.* (emphasis added). In reply, petitioners explained that, in light of absence of a mens rea requirement, "vagueness 'permeates' throughout the regulation in failing to provide one with fair notice, and the ability of law enforcement to arbitrarily enforce the ordinance and make it a trap for the unwary." Appellants' Reply Brief 9.

These are precisely the same claims that petitioners have advanced before this Court and are precisely the same claims that respondents acknowledge were *not* addressed by the court of appeals under *Morales*. Both here, and in the court of appeals, petitioners challenged Ordinance No. 12136 because it "criminalizes a broad swath of purely innocent conduct." Pet. 4-5; cf. Appellants' Opening Brief 29 (arguing that ordinance "is a 'trap for those who act in good faith'"). Both here, and in the court of appeals, petitioners showed that Ordinance No. 12136 was unconstitutionally vague because the interplay between terms such as "nuisance" and "contribute," coupled with the absence of any mens rea requirement, give law enforcement officials "unbridled discretion" to "decide what activities constitute a violation." Pet. 23; cf. Appellants' Reply Br. 9 (explaining that "vagueness 'permeates' throughout the regulation in failing to provide one with fair notice, and the ability of law enforcement to arbitrarily enforce the ordinance and make it a trap for the unwary").

In light of the appellate record, respondents are thus mistaken when they argue that further review should be denied because petitioners' claims of unconstitutional vagueness were limited to a challenge to the "close proximity" language of Ordinance No. 12136. To the contrary, respondents' tacit (and correct) acknowledgement that any application of *Morales* by the court of appeals' was limited solely to an assessment of the "close proximity"

language of Ordinance No. 12136, confirms that the court of appeals applied only *Salerno* (and not *Morales*) to the core of petitioners' vagueness challenges.

The court of appeals' failure to apply *Morales* is underscored separately by its treatment of petitioners' challenge to the omission of a mens rea requirement. Specifically, when addressing petitioners' argument that the lack of a mens rea element rendered the ordinance hopelessly vague, the court of appeals ruled only that this Court's decisions "never suggested that the absence of a mens rea requirement, by itself, renders a statute unconstitutional." Pet. App. 20a-21a. As support, the court of appeals held that the absence of a mens rea element did not trump *Salerno*'s requirement "that the complainant establish that the law is impermissibly vague in all its applications." *Id.* at 21a. That is, the court of appeals rejected as irrelevant the absence of a mens rea requirement based solely upon *Salerno*. *Id.* (rejecting petitioners' facial vagueness challenge because, under *Salerno*, "[t]he Association does not allege that [the ordinance] is impermissibly vague in all of its applications").[1]

B. The Court Of Appeals' Rejection Of *Morales* Is Outcome Determinative.

As petitioners demonstrated previously, the court of appeals' decision to apply *Salerno* rather than *Morales* is outcome determinative because if the court below had applied the *Morales* standard, it would have concluded that Ordinance No. 12136 is unconstitutionally vague. Respondents dispute that conclusion, arguing that petitioners' reliance upon the criminalization of innocent conduct and the absence of any

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[1] Respondents contend that this case is not amenable to review because the findings challenged have been affirmed by two lower courts. Opp. 5. That principle has no application here because the court of appeals made no findings under *Morales* with regard to the heart of petitioners' challenges to Ordinances Nos. 12136 and 12137.

mens rea requirement are "misplaced." Opp. 5. These arguments cannot be reconciled with *Morales*.

First, although *Morales* generated a number of separate opinions, a majority of the Court agreed that a statute that "reach[es] a substantial amount of innocent conduct" and fails to "establish minimal guidelines to govern law enforcement" is unconstitutionally vague even when challenged on its face. 527 U.S. at 60 (opinion of Court) (internal quotation marks omitted). Nevertheless, respondents insist that the question whether "the Ordinance reaches a substantial amount of innocent conduct" is relevant only to the "overbreadth" doctrine which applies solely "to laws restricting First Amendment rights." Opp. 5, 6. That argument is wrong under *Morales*, which held that the "broad sweep" of a criminal statute is central to vagueness challenges outside the First Amendment context. 527 U.S. at 60 (opinion of Court). That principle is especially relevant here, because Ordinance No. 12136 conscripts the owners and operators of hotels and motels in the city of Oakland to police potential "nuisance" activities on or in close proximity to their property and subjects them to criminal penalties based upon nuisance activity in which they took no part and about which they may have been wholly unaware.

Second, respondents never address the remaining prong of the *Morales* standard: whether the law establishes minimal guidelines to govern the exercise of law enforcement. See 527 U.S. at 60 (opinion of Court). Ordinance No. 12136 gives law enforcement officials unbridled discretion to determine whether the operation of a hotel "results in" or "contributes to" nuisance activity. It is not supported by any type of limiting construction that might guide law enforcement officials. Rather, as was the case in *Morales*, the ordinance provides law-enforcement officials with "'absolute discretion'" to decide what activities or operations constitute a violation. *Id.* at 60-61. Ordinance No. 12136 thus runs afoul of both prongs of *Morales* because it criminalizes a

substantial amount of innocent conduct and fails to provide minimal guidelines for law enforcement.

Equally unavailing is respondents' merits argument regarding the relevance of a mens rea requirement. Respondents assert that the absence of a mens rea requirement is not independently sufficient to establish that a statute is unconstitutionally vague. Opp. 6. Petitioners made no such claim. To the contrary, both petitioners and respondents recognize the test set forth by the plurality in *Morales*: a law that involves criminal penalties, contains no mens rea requirement, and infringes on constitutionally protected rights, is subject to facial attack "[w]hen vagueness permeates the text." 527 U.S. at 55; Pet. 24; Opp. 6.

Ordinance No. 12136 cannot pass muster under this test because it suffers from the same defects as the ordinance struck down in *Morales*. First, it imposes criminal penalties for violations of operating standards for hotels and motels. Second, the ordinance contains no *mens rea* requirement. Third, the ordinance implicates the constitutionally protected right to earn a living. See *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972) (the liberty guaranteed by the Fourteenth Amendment includes "'the right of the individual . . . to engage in any of the common occupations of life'") (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)). Because the ordinance satisfies these three elements from *Morales*, the court below should have inquired whether vagueness "permeates" the text of the ordinance.

C. The Absence Of A Limiting Construction Does Not Undermine The Need For Certiorari Review.

Finally, respondents contend that review of this petition is inappropriate because there has been no state court construction of the ordinances at issue. Opp. 10-11. Of course, respondents never suggested any limiting construction in these proceedings, and the notion of such a limiting construction is inconsistent with the "all-or-nothing" *Salerno*

standard that respondents advocated. But even if respondents had offered such a construction, the absence of a state-court construction limiting the scope of the ordinances does not undermine the need for review.

Respondents properly recognize that the loitering ordinance challenged in *Morales* had been construed by the state supreme court, and this Court was bound by that construction. Opp. 10; *Morales*, 527 U.S. at 61 (opinion of Court). To be sure, when "evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982). Yet this Court has never held that the absence of a narrowing construction is a prerequisite for review. To the contrary, as this Court explained in *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), "we have never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit." *Id.* at 770 n.11. As a result, if a statute is not "obviously susceptible of a limiting construction," the federal court should evaluate the facial challenge even if the statute has never been interpreted by a state tribunal. *City of Houston* v. *Hill*, 482 U.S. 451, 468 (1987). As noted, respondents have not suggested a construction that would limit the scope of Ordinance Nos. 12136 and 12137.

Moreover, the vagueness of Ordinance No. 12136 is not resolved through any obvious sort of limiting construction. Because the operation of a hotel or motel will not be visible to the public, law enforcement officials necessarily will be obligated to infer violations of Ordinance No. 12136 based on the existence of one or more nuisance activities on or near the hotel property. Thus, hotel and motel owners and operators can be held criminally liable for the conduct of others even if they are wholly unaware of the conduct or have no control over it. Considering the broad sweep of the ordinance and the

absence of guidelines for enforcement, further review by this Court is appropriate.

CONCLUSION

For these reasons, and those set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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